Family Affairs: March 2017

Financial Remedy update (1.10.16 – 3.03.17)

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Anonymity

In ***Norman v Norman [2017] EWCA Civ 49*** when refusing W's application for anonymity and while stressing that nothing in their judgment affected the judicial disagreement (arising out of the interpretation of FPR r.27.10) as to whether financial relief hearings at first instance should be heard in public or private, or as to the extent to which such proceedings can be reported, the CA made clear that the usual rule in financial remedy appeals would be that hearings would be in public and there would be no anonymity unless: (i) it is established that a party's article 8 rights are engaged; and (ii) on an application of the relevant balancing exercise described in the authorities, a private hearing, or some lesser measure such as anonymisation, is required (the law requiring the least interference with open justice compatible with a proven right to privacy). Where Articles 8 and 10 are both engaged they have equal status and neither has automatic precedence over the other: *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. The balancing exercise will focus on the specifics of the rights and interests in the individual case. S.1 of the Judicial Proceedings (Regulation of Reports) Act 1926 does not prevent the reporting of financial remedy

[1] I would like to acknowledge the assistance of a pupil, Iain Large, in the preparation of this article

appeals. If a party seeks such an order, however, the court needs to have a properly formulated paper application, rather than some vague oral application or one that is made by letter. In future (and subject to the exception below), the CA will expect that any application for the court to hear an appeal, or an application for permission to appeal, relating to financial relief proceedings either in private, or subject to reporting restrictions which anonymise the parties or prevent publication of information relating to the application ("an anonymity application"), will be the subject of a formal court application, setting out the grounds and supported by necessary evidence, upon which the anonymity application is based. Notice of the intended anonymity application, a copy of the Notice of Appeal and any evidence in support of the anonymity application should also be given by the applicant to media organisations by service on the Press Association's Copy Direct Service. The exception would be in a financial remedy appeal where, if all that is sought is to anonymise the names, dates of birth or other details of minor children, and the parties agree, a formal application may not be necessary. However, even then, a letter should be sent to the court indicating that such an application will be made and stating that the court may wish to consider whether the press should be informed. The three judgments should be read in full.

In ***X v X [2016] EWHC 3512 (Fam)*** Bodey J considered anonymisation of a judgment where the parties had been named and photographed attending the hearing but the judgment contained personal information not wholly in the public domain. H, while wealthy, was no celebrity. Bodey J, after carrying out the balancing of Art 8 and 10 rights against the specific facts of the case, in particular the nature of the information contained in the judgment, the previously (relatively) low public profile of the parties, and the effect of press intrusion on the husband and the children of the family, concluded anonymisation was justified (although H subsequently waived that right).

Procedure

Delaying Decree Absolute

In **Thakkar v Thakkar [2016] EWHC 2488 (Fam)** Petitioner W opposed H's application to make a decree absolute prior to the conclusion of the financial remedy proceedings. There were significant allegations of non-disclosure and issues as to H's wealth and entitlement to assets all held in off shore structures where W's situation would be

affected by the difference between a status as wife or former wife. There were therefore "special circumstances" and H's application was refused with costs. (Readers are reminded of Cobb J's review of the law relating to the relevance of decree nisi in financial orders in *K v K (Financial Remedy Final Order prior to Decree Nisi)* [2016] EWFC 23). Moor J subsequently dealt with the fact finding (***Thakkar v Thakkar & Ors [2017] EWFC 13***) and although rejecting H (and family's) contention that he had to find the foundation a "sham" nevertheless found that H held the entire beneficial interest in the group of companies.

Variation of Executory order

In ***Bezeliansky v Bezelianskaya*** **[2016] EWCA Civ 76** the parties had reached a consent order in 2013 involving the transfer of properties to W one of which it transpired H had already sold 3 years earlier. The order remained executory when Moor J accordingly varied it in 2015, directing the shares in the holding company which owned a property in Paris should be transferred to the wife, and the property then sold, and arrears of child maintenance that had accrued were to be discharged from the proceeds of sale. H's application for permission to appeal was refused. A capital order that remained executory could be varied (*Thwaite v Thwaite*). Further, an order the terms of which remained executory, as here, constituted one of five situations which may trigger a review of a consent order (following *L v L* [2006] EWHC 956 (Fam)), if it would be inequitable not to do so in light of a significant change of circumstances. The circumstances justifying intervention are likely to be met where, as here, an order remains executory as a result of one party frustrating its implementation.

Res Judicata; non-disclosure; appeals

Permission was granted for the CA's judgment in ***Norman v Norman*** **[2017] EWCA Civ 49** to be cited, notwithstanding that it was given on an application for permission to appeal. In 2009 W varied a 2005 consent maintenance order (unsatisfactorily for her). She successfully appealed but the CA on H's second appeal restored the DJ's 2009 order. In 2010 W unsuccessfully applied to overturn the 2005 order for non-disclosure and her appeal from the 2010 order was not pursued. In 2013 W successfully secured the overturning of the 2009 order for non-disclosure but the CA (again) restored it. W

then applied again to set aside the 2005 order for non-disclosure and the judge held her case to be totally without merit and made a limited civil restraint order against her. She now appealed that refusal. She had been represented throughout and the material on which she now relied was available to her in 2009 and 2010 but she wanted to deploy it in a 'different way', and sought to rely on a change in the law effected by *Sharland* (and the transfer of the burden of proof where fraudulent non-disclosure is proven) and what she contended was a relaxation of the law of *res judicata.* She contended that s. 31F(6) Matrimonial and Family Proceedings Act 1984 FPR r.4.1 (6) gave the Family Court unlimited powers to rescind an order. Her application for permission was refused. The power under r.4.1(6) was not 'unbounded'. The approach to such an application to set aside a consent order should reflect the CPR approach and the criteria in *Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518 against the backdrop of the desirability of finality in litigation, the undesirability of permitting litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal. The discretion might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, the application must be made promptly. Here there was an unexplained delay of 5 years. There was no new material on which W sought to rely. *Sharland* did not amount to a material change of circumstances. The lack of a material change was fatal to a r.4.1(6) application or any attempt to get round the principle in *Henderson v Henderson* and *res judicata*, notwithstanding the more liberal approach apparent from *Arnold v National Westminster Bank Plc (No.1*) [1991] 2 A.C. 93 and *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, which the judgment discusses in detail.

Committal proceedings

In ***Bezeliansky v Bezelianskaya*** (above) H was in arrears of £253,000 in respect of child maintenance and W brought a judgment summons in respect of the arrears expressly to bring pressure upon H to transfer the Paris property from the proceeds of which the arrears could be met. Having found, to the criminal standard, both breach of

the order and ability to pay, Hayden J considered what outcome was proportionate in the circumstances and concluded that a six week prison sentence must be imposed, but suspended on terms that H complied with all of the requirements of the financial provision order relating to the Paris property. H's appeal failed. In circumstances where H's wealth was measured in many millions of pounds, the judge was perfectly entitled to consider that he would have been able to pay, or raise by loan, the sum of £253,000 which, in the context of the finances in the case, would be a very modest requirement. Hayden J was entitled to impose a tight timetable for the implementation of Moor J's order with the potential for the terms of suspension to be varied if, despite reasonable endeavours, it was necessary to do so. The CA rejected H's argument that the judgment summons process was an inappropriate mechanism to use in order to achieve enforcement of the capital transfer provisions. While on one view, terms of a suspended committal order designed to enforce a debt of £253,000 by means of achieving a capital transfer worth many times that sum might seem wholly disproportionate, each case will turn on its own facts, and here the tying together of the transfer of the Paris property, as required by the 2nd March order, with enforcement of the judgment summons debt by means of a suspended committal order was entirely justified and, in the circumstances, proportionate.

Iqbal v Iqbal **[2017] EWCA Civ 15** was a case with a lengthy history, and where a fundamental issue was the extent to which H was able to access the wealth of his family in Pakistan. After H disengaged midway through proceedings in 2011 and returned to Pakistan there were a number of hearings and judgments summons held in his absence. W continued to play an active role, though at times representing herself. H had been excused attendance at an interim hearing, but he had attended at the first appeal, and had filed a number of documents with the court in purported compliance with its directions. The Court of Appeal concluded that elementary procedural protections that H had a right to expect would be observed were not. The consequence was that the final hearing was procedurally unfair and the order made at the end of it must be set aside and the matter remitted for final hearing before a new judge. The subsequent enforcement hearings including H's committal to prison for 6 weeks were wholly irregular in that no procedural protections were provided at all. The 'most glaring omissions' that arose in the final hearing were as follows:

- No consideration given to facilitating H's participation despite his absence, e.g. by video link (para [15])
- No warnings to H of the consequences of his continued absence or that inferences of fact might be drawn in his absence [16]
- No real attempt at active case management [16]
- W's statement was filed only eight days before the hearing (rather than allowing H five weeks to reply, as directed), with no leave given to rely on it out of time [17]
- W's statement was not served on H in any event [17]
- W's statement was itself insufficient to establish her case [17]
- Possibility that documents provided by H were omitted from the court bundle, of which no copy existed at the time of appeal in any case [18]
- No reference to H's documents in the hearing itself; H's non-compliance being held against him despite there being no analysis by the judge [19]
- A lack of inquisitorial analysis by the judge; assumptions made about H in exchanges between the judge and W; no enquiries made of the existence or content of basic documents such as H's Form E [20]
- W was not sworn and her evidence was in the form of signed letters with no statement of truth [21]
- No testing of any of W's evidence [21]
- Inadequate and inaccurate calculations of H's assets purely from W's untested evidence [21]
- No formal judgment; no discernible findings of fact, including what evidence was accepted and what rejected [22]

Likewise in the judgments summonses and committal proceedings:

- Failure to acknowledge the importance of procedural safeguards in committal proceedings (see s 5(2), DA 1869, Part 33, FPR 2010 and *Prest v Prest* at [55] & [62]) [27,28]
- Failure to file evidence in support of W's enforcement application [30], reliance on signed, unsworn letters [31]

- W was not sworn to given evidence [30 & 33]
- No evidence to the criminal standard of H having the means to pay and refusing/neglecting to do so [30 & 33]
- Dealing with the merits of a judgment summons and making a committal order at a directions hearing without notice to H [33]
- No judgment given [33]

Jurisdiction (Brussels I); ToLATA

Magiera V Magiera [2016] EWCA Civ 1292 was an appeal from Bodey J's decision in *G v G* [2015] EWHC 2101 (Fam) in ToLATA proceedings concerning the parties' property in London. H had appealed the finding that the English court had jurisdiction under Article 22(1) of Brussels I, reached on the basis that the ToLATA proceedings had, as their object, rights *in rem* in immovable property situated in England. Bodey J had distinguished the case at hand from *Webb v Webb*, a CJEU decision which held that a father seeking to acquire rights *in rem* from his son was essentially proceeding against the son *in personam*, thereby not satisfying Art. 22(1). Here, W already had a proprietary right as a co-owner and sought merely to give effect to it; while the order for sale would be *in personam* against H, the right of ownership itself was *in rem*. Since the first instance decision, the CJEU had given judgment in *Komu v Komu*, which proved a major obstacle to H's appeal. It stressed, as in *Webb* and previous cases, that Art. 22, as an exception to the usual rule that persons should be sued in the courts where they are domiciled (Art. 2(1)), should not be given any broader interpretation than necessary and repeated that the rationale for Art. 22(1) was that it tended to be most convenient to hear a case regarding proprietary rights in the jurisdiction where the property was located. The Court determined a question similar to that which arose in the present case: that an action for the termination of co-ownership in undivided shares of immovable property by way of sale falls within Art. 22(1). The CJEU had made clear that its definition of Art. 22 should take precedence over domestic decisions, and thus the English authorities relied on by H were of little assistance in light of *Komu*. Black LJ considered nonetheless whether it made a difference that an order for sale was rooted in the English law of trusts, in that such an order involved the exercise of the functions of the trustees. She explored the procedure for orders for sale under CPR Part 40 and

PD40D, and the enforcement procedure in s.39 Senior Courts Act 1981, and concluded that, given what the order for sale involves on the ground, the court where the property was situated would clearly be best placed to consider an order for sale. Relying particularly on *Komu*, and agreeing that *Webb* should be distinguished, W's proceedings in the present case fell within Art 22(1).

Part III 1984 Act

Johnson v Takieddine & Anor [2016] EWHC 1895 (Fam) was an application made by a former wife under Part III of the MFPA1984, and for the enforcement, by way of a charging order, of a capitalised maintenance order made by a French Court.The parties divorced in France, where the court made a capitalised maintenance award in favour of W but neither party had yet applied to initiate the judicial liquidation process to determine how to effect the equal division of marital property to which under French law the parties were entitled. These Part III proceedings focused on a property located in London, occupied by W, but owned legally by a company (WEL) over which H had control, and which H claimed was purchased as an investment and not as a family home. Moylan J, agreeing with W, held that the property clearly was '*a* marital home' and that a family could have more than one matrimonial home. H argued that the court had no jurisdiction to entertain the present dispute over whether H was the beneficial owner given the existence of French proceedings. Moylan J held that, as it was a claim for a share of the marital wealth and not one of maintenance, none of the relevant EU provisions was invoked. Moreover, because there were no pending proceedings in France, nor any French court currently seised of the matter, there was no possibility of irreconcilable judgments. This court was in any case better placed to decide the issue of beneficial ownership than a court in France, given the application of English trust principles and the uncertainty over whether a French court would have jurisdiction. He rejected H's plea of issue estoppel on the facts because neither issue estoppel nor the principle in *Henderson v Henderson* applied as there was no issue which had formed a necessary ingredient in the previous judgment and been decided, which was now relevant to the Part III proceedings and which W sought to reopen. The issue of beneficial ownership had simply not been determined in the earlier proceedings. In

turn, the question of beneficial ownership was decided in W's favour. The judge noted the factual similarities with *Prest v Petrodel*, and Sumption JSC's tentative suggestion that 'in the case of the matrimonial home [legally owned by a company], the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company'. As in *Prest,* WEL had failed to engage with proceedings or provide disclosure at the direction of H as its controller. The Part III application sought a transfer of the home into W's sole name. Moylan J felt he could not engage with considerations under s.25(2) of the 1973 Act but considering ss.16 & 18 of the 1984 Act together, he did not feel it would create an 'improper conflict' to split the equity between the parties in notional half shares. Moreover, it would be appropriate to permit W to enforce against H's share both the costs orders previously made in this jurisdiction against him and, potentially, against WEL, along with the capitalised maintenance awarded in France.

Pre-nuptial agreements

In ***DB v PB*** **[2016] EWHC 3431 (Fam)** the parties were Swedish. It was a 21 relationship with 2 children (12 and 8), in which they started out with nothing. It was agreed to be a case of equal contributions (albeit all the money was made by H). The assets (subject to any tax) were £10.86m, all save the FMH in H's name. 3 pre-nuptial agreements were signed in US and Sweden with prorogation clauses which the judge found validly, for the purposes of Article 4 of the EU Maintenance Regulation, limited W's maintenance claims to be resolved in Sweden and limiting the English court to "rights in property arising out of a matrimonial relationship". He held the parties consensually entered into one or more prenuptial agreements and that, at the time when they were entered into, the effect of the agreements was not vitiated by factors such as fraud misrepresentation or undue pressure. He rejected H's case that a 'sharing' claim was in practice a maintenance claim and thus barred by the prorogation clause, but if the ante-nuptial agreements were otherwise valid the property claims could only be pursued to the extent it would be unfair to hold the parties to them. Here W would be limited to 5-6% of the assets. This would work unacceptable unfairness on W and, worse still, would adversely affect the best interests of the children (which was a priority under *Radmacher*). However, to respect the autonomy of the parties it would be

wrong simply to disregard the agreement; rather it was the court's duty to step in to alleviate (only) the unfairness. However, to assess W's claim on need would be to render the claim a maintenance claim under Art 4, in respect of which the court's jurisdiction was barred. Thus the judge could only order a sale of FMH and its equal division, and could order neither a lump sum nor a property adjustment. However, he could and would make an order under Sched 1 of a housing fund of £2m and a global carer's and children's periodical payments order of £95,000 pa.

Xhydias agreement

***G v S* [2017] EWHC 365 (Fam)** concerned Swedish parties who agreed heads of agreement in respect of a Sched 1 claim including a £2.1m housing fund, agreeing to be bound by *Xydhias* principles, but leaving some issue unresolved. The father sought to include a clause preventing the mother from obtaining a replacement property outside England and Wales before the child completed her primary education. Hayden J accepted the mother's case that this would be "wrong in principle", the child's welfare being a "constant influence on the discretionary outcome," in Schedule 1 proceedings, and the provision would not be ordered even if the parties agreed, and *Xhydias* was disapplied. Other issues concerned a mutual confidentiality agreement which went (well) beyond Practice Direction 12G - Communication of Information and Mostyn J's draft. Hayden J did not have the material upon which he could balance the Art 8 and 10 considerations but concluded H's proposed terms were too ambitious and the restrictive orders should be confined to those set out in the guidelines. The judge observed that a strength of *Xydhias* agreements is that they are not constrained by the language of the statutes by which they are framed. He was content to permit the inclusion of "innocuous, anodyne or ultimately meaningless phrases" if they facilitated settlement which in this case included that 'the mother agrees that she has no present intention of seeking a further lump sum'.

Non-Disclosure

In ***Goddard-Watts v Goddard-Watts*** [2016] EWHC 3000 (Fam) the court considered the approach it should take when rehearing a financial claim following the previous final order having been set aside for non-disclosure (*KG v LG (Appeal out of time;*

Material non-disclosure) [2015] EWFC 64), having regard to the "enormous flexibility to enable the procedure to fit the case" (*Sharland v Sharland* [2015] UKSC 60) and that while in some cases this will require the court to "start from scratch", in others it will not (*Kingdon v Kingdon* [2010] EWCA Civ 1251). The parties agreed the sharing principle was determinative (albeit they disagreed on the share W should have of the trusts in issue) but the dispute was whether W's award should be based on the value of the assets at the time of the first hearing (H's position) or the current values (W's position: she contended that any other conclusion would allow H to preserve his accumulated wealth, founded "as it was" upon the fraudulent presentation of his resources in 2010). Moylan J held that the fact that this was a re-hearing was not itself a reason to re-calculate the award on the basis of the current value of the assets. He found that on the whole this was a case akin to *Kingdon v Kingdon* [2011] 1 FLR 1409; the defect caused by non-disclosure was a discrete one which did not undermine the calculation with respect to the other resources, the division of which remained fair. As the interest in the trust was a marital resource (per *Charman v Charman* [2006] 2 FLR 422), W was entitled (after giving appropriate weight to the interest of other beneficiaries) to half the value, totalling £6.22 million. This was to be increased by a 'discretionary' £200,000 to reflect the fact that, had it been made with the original order, the wife would have received it earlier and the lump sum would not have been ordered to be paid over an 8-year period .

Costs following non-disclosure

In ***AB v CD* [2016] EWHC 2482 (Fam)** H had secured the set aside of a consent order following W's material non-disclosure relating to her company and its funding (*AB v CD* [2016] EWHC 10 (Fam))**.** H sought costs on the indemnity basis, with an immediate substantial payment on account. W complained of H's disproportionate pursuit of allegations of fraud and in respect of off shore companies and his disclosure to the press which had increased her resistance to his inquiries. W had made an early offer to settle. She was acquitted of fraud but H had succeeded in the central issue of the set aside application. The general (no order) rule as to costs set out in rule 28.3(5) has no application in proceedings to set aside a consent order which is based upon non-disclosure. By virtue of CPR 44.3(4) (which applied to these proceedings by FPR 2010 r

28.2(1)) the court had to consider the conduct of the parties; whether a party has been successful in whole or in part; and any admissible offers made by the parties, anchoring the assessment by reference to the particular facts of the case, while having regard to the financial effect on the parties of any costs order (FPR r 28.3(f)). Balancing W's conduct and H's own litigation misconduct, Roberts J awarded H 50% of his costs but on an indemnity basis (since her defective response to the request for information, for which there was no justification, took the case "out of the norm"), stayed pending the outcome of the rehearing of the financial remedies application, when she would also consider H's application for costs in respect of the original proceedings. Thus there was no immediate payment on account.

S.25 Factors

Non-marital assets

***Scatliffe v Scatliffe* [2016] UKPC 36** an "ill-starred appeal" by H against financial orders made in the BVI where the law remains broadly similar to the MCA 1973 (save for the 1985 amendment in respect of putting the parties back in the position they would have been had the marriage subsisted). The Privy Council dismissed the appeal finding the orders to be entirely reasonable, giving to each of the parties a home in which to live for the rest of their lives and a rental income on which, even without other income, they could subsist. It appeared moreover to represent an outcome on a clean break basis which was fair to both parties in the light of all the relevant circumstances and which represented a reasonable discharge of the obligation cast upon the court in the concluding words of section 26(1) of the BVI statute. The lower court had however failed to bring into account a property inherited by H, while H had failed to disclose some of his assets. The PC observed the local courts seemed not to understand the concept of matrimonial assets and provided useful guidance encapsulated in 10 propositions at para [25].

Resources and Contributions

***X v X* [2016] EWHC 1995 (Fam)** concerned the discounts to be applied to H's shareholding on the basis of the husband's unique importance to the company (on the

facts H would be able to counter the negative effect of a sale and the discount was limited 8%); the extent to which shares held in a LTIP scheme acquired post separation but arising from employment during the marriage should be treated as 'matrimonial' (50% so treated); the extent to which H's interests under discretionary trusts should be treated as a resource (the question was whether, if H requested the capital of the trust from the trustees, they would be likely to advance it to him. While accepting the trustee's discretion was entirely unfettered, given that the wording of the trust described the husband as the 'primary beneficiary' to whom any income from the trust would be given, and that H alone among the beneficiaries could be considered for the advancement of capital, it was likely that the trustee would accede to any request from H for up to 50% of the capital, leaving ample funds behind for other beneficiaries); and issues in relation to 'unmatched contributions'. On this H relied on pre-marital savings some of which were invested in the marital homes. The judge could see no reason to depart from the general rule that payments like these into the matrimonial home become so much a part of the parties' shared family economy as to become or be swallowed up by 'matrimonial property'. H's savings had also contributed £0.5m to supporting the family in about 2000 during the early life of the company enabling its earnings to be ploughed back, which justified giving weight to this "in a broad way" in considering departure from equality. H's claim to have made a *Lambert* special contribution failed. He had seen and seized the opportunity to adapt and improve what was already happening, rather than exercised a spark of innovative genius, nor was the net wealth created in the league of Sorrell, Charman or Cooper-Hohn. The judge did accept H's post separation endeavour as relevant. However, he rejected H's case that his contributions throughout the marriage in respect of domestic and child care activity, when W's contributions were diminished due to alcoholism (which was not to be categorised as her 'fault'), were such as to amount to an unmatched contribution which should be taken into account as regards the outcome. While the contributions were unequal, they were not so unequal as to reduce W to a needs case. There would be a discount to sharing and, checked against her needs, a fair outcome was 37.5% of the assets. The share price had increased significantly between the hearing and judgment but Bodey J held that any court should be 'very slow indeed' to admit adjustments after the hearing and before judgment; the hearing was the logical point to take the 'snapshot' of the assets.

Short marriage; stock piling; standard of living

The question of how to provide for a claimant spouse after a short marriage (19 months: 4 year relationship), where H's high earning career (£1m pa as a footballer) would be limited in time, but W would have long term obligations as carer of their child (of 22 months) was addressed in ***AB v FC* [2016] EWHC 3285 (Fam)**. The parties lifestyle (spending at a "prodigious rate") meant there was no significant marital acquest, realisable assets being c. £500,000. It was thus agreed to be a needs case but the judge assessed these conservatively, with a lump sum of £365K, assessing her housing need at £700K against W's housing budget of £1.7m (with a £1.1m mortgage). The parties had never owned a property but rented (£52K pa). H contended W should rent but the judge held this would be a waste. It was moreover held not unreasonable for W to be able to "stockpile" some of her periodical payments to divert to discharging her mortgage liability (cf *Field v Field* [2015] EWHC 1670 (Fam)). The presence of the child was an overarching consideration in assessing needs and the award. W would have no right to share in H's future bonuses. The award: child maintenance £36,000 pa, nursery/school fees £14,000, a mortgage allowance £80,000, joint lives spousal maintenance £84,000 to be reviewed in 7 years (against W's aspiration for £318K global maintenance and H's offer of £144K to include rent), and in light of W's need half her residual costs liability (there had been previous LSPOs).

Roberts J's comments on the relevance of the standard of living during the marriage (that the longer the period during which needs are to be met by the paying spouse, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage) is consistent with a number of recent decisions including an unreported decision (*MacFarlane*: Daily Telegraph 13.2.17) in which Moylan J is said to have commented that "the previous living standards of a couple were only a guide" and his comments in *BD v FD* [2016] EWHC (Fam) 594 and Mostyn J's in *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124

Delay

Briers v Briers [2017] EWCA Civ 15 provided reinforcement of the principle that delay may be a (very) relevant factor, but nevertheless only one factor in the s.25 exercise in a case where needs were provided for and the issue was entitlement. W issued Form A 11 years after separation and 8 years after decree absolute. Following *Wyatt v Vince* the judge was not wrong to discount her share of the assets from 50% to between 27-30%. Ryder LJ rejected H's case that W's delay required her to discharge the burden of justifying any distributive remedy solely on the basis of need, nor did it deny her entitlement to share in post-separation accrual where H had traded with W's share in what was held to be an undivided matrimonial asset. The judge had to adopt a valuation and the business' current value, rather than that at separation, was fair subject to the above discount. A factual appeal as to the existence of a concluded agreement was rejected (not least because of H's failure to provide full and frank disclosure (*Radmacher v Granatino*))

Pensions: *Goyal*

The litigation arising from the *Goyal* case of which Mostyn J observed " It has been going on for far too long and so far as I can tell there is virtually no money left" has continued following the CA's decision ([2016] EWCA Civ 792) when the court expressed an *obiter* view that a PSO could be made in respect of an overseas pension. Having heard H's counsel change his position and now argue that a PSO could not be made (contrary to the invited submissions of the FLBA and Resolution – at least in respect of an exported UK pension scheme, i.e. a QROPS ("qualifying recognised overseas pension scheme") Mostyn held (***Goyal v Goyal* [2016] EWHC 2758 (Fam)**), relying on the presumption against extra-territorial effect of a statute, that the procedure relating to pension sharing could not extend beyond the domestic context and a PSO (s.24B) was not available in respect of any foreign pension. In any event W had failed to submit proper evidence that any such order would be enforced in India. Mostyn J did observe that there were a number of possible alternative routes to achieving direct sharing of overseas pensions:

1. A consent order with undertakings to obtain an order splitting the pension in the jurisdiction in question;
2. A *Brooks v Brooks* variation of a nuptial settlement (section 24(1)(c) of the 1973 Act, which remained effective in cases that did not fall under section 25D);
3. A property adjustment order, provided that there is clear evidence that the order would be enforced by the foreign court

Ultimately, the first instance judge had wanted to award the wife the entire benefit of the husband's annuity. Mostyn J noted that the entire litigation could have been avoided by way of a two-part periodical payments order: the husband would pay, in addition to the existing monthly periodical payments, the full amount that he could draw from his annuity contract on a quarterly basis. Such orders are commonly made, for example in cases where a party has both a salary and a bonus. And it was here that, if necessary, an injunction under s.37 Senior Courts Act 1971 could properly come into play, supporting the existing legal right within the periodical payments order and mandating the husband to receive and pay the full annuity amount.

Goyal v Goyal (No. 3) **[2017] EWFC 1** was the next installment (which he hoped would bring to an end "this long running and futile litigation") when Mostyn J was to consider the beneficial ownership of the rights under the Indian annuity contract, W's deemed application for a variation of the periodical payments order so that she receives all the benefits arising under the annuity contract, and H's application to reduce the existing periodical payments. The judge opined that Judge Brasse's findings as to ownership had not been under appeal and thus could not be set aside (as the CA order purported to do). Mostyn J would have reached the same conclusion in any event (that H owned it and had not transferred it to another) and held that anyway H was prevented by issue estoppel from reopening the issue. Judge Brasse had found that because H had lost such vast sums by reckless gambling W should recover the few scraps that were left, including the proceeds of some shares that in the event had been distrained by a creditor, so there were powerful reasons for making a supplementary periodical payments order in favour of W (subject to dissuading H from frustrating them). H had failed to obtain good employment and his reduced circumstances justified a reduced periodical payments order. The PPO would be in two parts, the first would be the monthly amount payable by H under Judge Brasse's order as varied (as above). The

second limb would provide that H would pay to W two-thirds of the quarterly income deriving from the annuity policy as it arises. There would be a bolstering injunction made against H requiring him to procure that these payments go to W, made pursuant to *Blight v Brewster* [2012] 1 WLR 2841 following *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17.

Bankruptcy

A trustee in bankruptcy in ***Re Elichaoff v Woodall*** **[2016] EWHC 2987 (Ch)** failed to secure permission to appeal a Registrar's strike out of his application in the Bankruptcy Court against W for a lump sum or property adjustment order (ss.23,24 MCA 1973) for the benefit of H's creditors in circumstances where a consent order was agreed between H and W shortly before H's bankruptcy (but after service of the bankruptcy petition). The District Judge made the order ignorant of the bankruptcy. H died 5 years later. The following year the trustee made his application. The trustee admitted his argument was 'innovative and novel' and it was rejected on the basis that matrimonial causes legislation being essentially a personal jurisdiction arising between parties to the marriage, H's death terminated his rights under the MCA 1973 which in any event were not property vesting in the trustee nor a "cause of action" for the purposes of s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 . Moreover the trustee could not sustain a claim under the 1973 Act against W for the benefit of the bankrupt's creditors based on the deceased H's "obligations". W's application to set aside permission to the trustee to appeal a declaration that payments made by the Bankrupt to W totaling some £40,000 were transactions at an undervalue pursuant to s.339 of the 1986 Insolvency Act was refused.

And finally……..A cautionary tale

In **Smith v BSB [2016] EWHC (Admin)** a barrister faced disciplinary proceedings when his client alleged he had been told the barrister had secured a clean break in FDR negotiations, when in fact it was a nominal order for periodical payments. The solicitors who had been present had a conflict of interest and supported the complaint. The barrister had no contemporaneous note of the advice given, the solicitors had thrown away their original notes and there was an issue whether the attendance note they

produced may have been prepared for the proceedings. Had the barrister kept a full note his position would have been easier. In the event the judge found that it would have been "ridiculous" for the barrister to have told the client and solicitors he had achieved a clean break when the draft order clearly did not achieve one, and moreover the deal negotiated was arguably very favourable to the client. The barrister's appeal against the BSB finding against him was allowed.

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